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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

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9 Todd Van Dam,

10 Plaintiff,

11 vs.

12 Michael J. Astrue, Commissioner of Social  
13 Security,

14 Defendant.

No. CV11-0956-PHX-DGC

**ORDER**

15 Plaintiff filed an application for supplemental security income (SSI) on April 29,  
16 2008, claiming a disability onset date of April 1, 2011 due to mental impairments.  
17 TR 19. The application was denied initially on July 30, 2008 and again on October 8,  
18 2008. *Id.* A hearing before an administrative law judge (ALJ) was held on December 9,  
19 2009. *Id.* The administrative law judge (ALJ) issued a decision on February 19, 2010,  
20 finding that Plaintiff was not disabled within the meaning of the Social Security Act.  
21 TR 16-32. This decision became Defendant's final decision when the Appeals Council  
22 denied review. TR 1-3. Plaintiff commenced this action for judicial review pursuant to  
23 42 U.S.C. § 405(g). For the reasons that follow, the Court will affirm Defendant's  
24 decision.

25 **II. Standard of Review.**

26 Defendant's decision to deny benefits will be vacated "only if it is not supported  
27 by substantial evidence or is based on legal error." *Robbins v. Soc. Sec. Admin.*,  
28 466 F.3d 880, 882 (9th Cir. 2006). "'Substantial evidence' means more than a mere

1 scintilla, but less than a preponderance, i.e., such relevant evidence as a reasonable mind  
2 might accept as adequate to support a conclusion.” *Id.* To determine whether substantial  
3 evidence supports Defendant’s decision, the Court must review the administrative record  
4 as a whole, weighing both the evidence that supports the decision and the evidence that  
5 detracts from it. *Reddick v. Charter*, 157 F.3d 715, 720 (9th Cir. 1998). If there is  
6 sufficient evidence to support Defendant’s determination, the Court cannot substitute its  
7 own determination. *See Young v. Sullivan*, 911 F.2d 180, 184 (9th Cir. 1990).

### 8 **III. Analysis.**

9 Plaintiff claims that (1) the ALJ’s determination that Plaintiff is unable to sustain  
10 work on a regular and continuous basis due to substance abuse is not based on substantial  
11 evidence; (2) the ALJ did not accord adequate weight to the opinions of Plaintiff’s  
12 treating physicians in conformity with 20 C.F.R. § 404.1527; and (3) the ALJ should  
13 have considered Plaintiff’s borderline personality as a severe and disabling condition.  
14 Doc. 10.

#### 15 **A. Substance Abuse as a Material Contributing Factor.**

16 Whether a claimant is disabled is determined using a five-step sequential  
17 evaluation process. The claimant bears the burden in steps one through four. To  
18 establish disability the claimant must show (1) he is not currently working, (2) he has a  
19 severe medically determinable physical or mental impairment, and (3) the impairment  
20 meets or equals a listed impairment or (4) his residual functional capacity (RFC)  
21 precludes him from performing his past work. 20 C.F.R. § 416.920(a). At step five, the  
22 Commissioner bears the burden of showing that the claimant has the RFC to perform  
23 other work that exists in substantial numbers in the national economy. *Id.*

24 The ALJ found that Plaintiff suffers severe impairments of schizoaffective  
25 disorder, depressive disorder, and substance abuse. TR 22. The ALJ found that these  
26 impairments do not individually or in combination meet the criteria for severity listed in  
27 20 C.F.R. § 416.920(d). Considering Plaintiff’s age, education, work experience, and  
28 RFC impaired by substance abuse, the ALJ determined that there are no jobs that exist in

1 significant numbers in the national economy that Plaintiff can perform. TR 28. “With  
2 substance abuse, [Plaintiff] is unable to meet the basic mental demands of competitive  
3 unskilled work on a sustained basis.” TR 29.

4 Notwithstanding this initial disability determination, the ALJ was required to  
5 perform an additional analysis in light of Plaintiff’s medical record of substance abuse.  
6 The Commissioner “must determine whether [a claimant’s] drug addiction or alcoholism  
7 is a contributing factor material to the determination of disability . . . .” 20 C.F.R.  
8 § 416.935(a). The key factor is whether the Commissioner would still find the claimant  
9 disabled if he stopped using drugs or alcohol. 20 C.F.R. § 416.935(b). An individual is  
10 not considered “disabled” for the purposes of receiving SSI “if alcoholism or drug  
11 addiction would . . . be a contributing factor material to the Commissioner’s  
12 determination that the individual is disabled.” 42 U.S.C. § 1382c(3)(J).

13 Plaintiff did not meet his burden of showing that his substance abuse was not  
14 material. *See Parra v. Astrue*, 481 F.3d 742, 748-50 (9th Cir. 2007). Plaintiff’s medical  
15 records are replete with diagnoses and his own admissions of alcohol dependence.  
16 TR 22-23, 223, 226-27, 278, 320. The medical evidence, as well as Plaintiff’s own  
17 reports and hearing testimony, indicate that Plaintiff has not complied with the medical  
18 regimens prescribed by his physicians. Plaintiff self-discontinued anti-psychotic  
19 medication, declined substance abuse treatment, and declined inpatient care. TR 223,  
20 301-02, 305. Plaintiff notes that he did not consume alcohol while incarcerated and  
21 “continued to have difficulties dealing with stress, self-mutilated, reported seeing bugs,  
22 expressed anger, and was described as pessimistic,” and argues that this evidence  
23 supports a finding of disability independent of substance abuse. Doc. 10, at 4. However,  
24 it is insufficient to show that limitations exist independent of substance abuse. Plaintiff  
25 must prove that these remaining limitations are disabling. *See* 20 C.F.R. § 416.935(b)  
26 (“If we determine that your remaining limitations would not be *disabling*, we will find  
27 that your drug addiction or alcoholism is a contributing factor material to the  
28 determination of disability.”) (emphasis added).

1       The ALJ properly considered the entire record in analyzing which limitations  
2 would remain if the substance abuse stopped and whether they would be disabling. The  
3 ALJ considered medical evidence that Plaintiff may have mild-to-moderate difficulty  
4 interacting appropriately with the public and moderate difficulty responding to  
5 supervisory criticism, getting along with co-workers, and sustaining concentration.  
6 TR 29. The ALJ also considered that Plaintiff would not have problems with personal  
7 care, preparing simple meals, and performing household chores. TR 144-51, 281-84.  
8 Plaintiff is able to pay his bills, count change, and handle a checking account. TR 144-  
9 51. The ALJ determined that if Plaintiff stopped his substance abuse, his mental health  
10 symptoms would not prevent him from maintaining unskilled work and that his  
11 remaining limitations would not be disabling. TR 29-31.

12       This determination meets the substantial evidence standard. “Where the evidence  
13 is susceptible to more than one rational interpretation, one of which supports the ALJ’s  
14 decision, the ALJ’s conclusion must be upheld.” *Thomas v. Barnhart*, 278 F.3d 947, 954  
15 (9th Cir. 2002). Because substantial evidence supports the ALJ’s determination that  
16 substance abuse is a contributing factor material to the disability determination, the Court  
17 must uphold the ALJ’s decision that Plaintiff is not disabled within the meaning of the  
18 Social Security Act and is ineligible for SSI. 42 U.S.C. § 1382c(3)(J).

19       **B.     Weight Accorded to Treating Physicians.**

20       Regarding the weight that an ALJ should give to a particular medical opinion, the  
21 Ninth Circuit distinguishes between the opinions of treating physicians, examining  
22 physicians, and non-examining physicians. *See Lester v. Chater*, 81 F.3d 821, 830  
23 (9th Cir. 1996). Generally, an ALJ should give greatest weight to a treating physician’s  
24 opinion and more weight to the opinion of an examining physician than to one of a non-  
25 examining physician. *See Andrews v. Shalala*, 53 F.3d 1035, 1040-41 (9th Cir. 1995);  
26 20 C.F.R. § 416.927(d)(1), (2).

27       If a treating physician’s opinion is controverted by a non-treating physician’s  
28 opinion, the ALJ must make findings setting forth “specific, legitimate reasons’

1 supported by substantial evidence in the record” for rejecting it. *Murray v. Heckler*,  
2 722 F.2d 499, 502 (9th Cir. 1983). “The ALJ can ‘meet this burden by setting out a  
3 detailed and thorough summary of the facts and conflicting clinical evidence, stating his  
4 interpretation thereof, and making findings.’” *Thomas*, 278 F.3d at 957 (quoting  
5 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)).

6 Practitioner Lusk was Plaintiff’s treating provider.<sup>1</sup> Among the diagnoses she  
7 provided in Plaintiff’s Supplemental Questionnaire were marked limitations with  
8 understanding and remembering short, simple instructions and extreme limitations with  
9 responding appropriately to work pressures in a usual work setting. TR 303-04. The  
10 ALJ gave some weight to Practitioner Lusk’s opinion, but found that she did not  
11 adequately address Plaintiff’s substance abuse and that her notes did not comport with the  
12 Plaintiff’s overall treatment record. TR 27. The Court finds these to be specific reasons  
13 for giving less weight to Practitioner Lusk’s opinions, and that the ALJ’s reasons are both  
14 legitimate and supported by substantial evidence. As the ALJ noted, Drs. Vaughan,  
15 Rabara, and Nagella all diagnosed Plaintiff with alcohol dependence. TR 22-23. The  
16 ALJ also noted the following additional information from the medical records. In a July  
17 2008 exam by Dr. Rabara, Plaintiff reported that he had 10 driving under the influence  
18 offenses and that he last consumed alcohol “last night. I had a bunch.” *Id.* at 23.  
19 Plaintiff reported that he drinks “every other day,” and admitted to recreational use of  
20 marijuana. *Id.* Treatment notes from November of 2008 show that Plaintiff was “not  
21 really” taking his medications, that he was still drinking, and that he smelled of alcohol  
22 during the exam. TR 23. Practitioner Lusk’s notes from June of 2009 indicate that  
23 Plaintiff reported he drinks beer every other day, as much as he can; that he declined  
24 inpatient treatment and detoxification; and that he declined medications. *Id.* In October  
25 of 2009, Practitioner Lusk noted that Plaintiff reported drinking one day and being hung

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26 <sup>1</sup> The Court does find it necessary to address the distinction between “acceptable  
27 medical sources” and “other sources” because the ALJ properly weighed Practitioner  
28 Lusk’s findings, and her status as a nurse practitioner would not alter the outcome. *See*  
Doc. 11, at 9-10; 20 C.F.R. § 415.913(a).

1 over the next, that he usually drinks 15 beers at a time, and that he had not obtained his  
2 medication for months. *Id.* at 23-24. Practitioner Lusk provided a check-the-box  
3 summary of Plaintiff's limitations on October 27, 2009, as well as this brief finding:  
4 Plaintiff "has auditory hallucinations daily, at times constantly which interfere with his  
5 functioning." TR 303. Despite the substantial information in the medical record  
6 regarding Plaintiff's substance abuse and her own diagnoses of Plaintiff's alcohol  
7 dependence (TR 306, 311), Practitioner Lusk's brief medical findings made no mention  
8 of alcohol dependence (TR 303-304). The Court finds the ALJ's reasons for according  
9 her opinion less weight to be specific, legitimate, and supported by substantial evidence.

10 An ALJ need not accept such a treating physician's opinion if it is brief,  
11 conclusory, and unsupported by clinical findings. *See Thomas*, 278 F.3d at 956-57  
12 (citing *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992)). The ALJ found that Dr.  
13 Vaughan's assessments were not accompanied by appropriate clinical signs or findings,  
14 and that he "simply ticked a box agreeing with the claimant's statement of his  
15 impairment." TR 27. Dr. Vaughan marked a box indicating that Plaintiff had  
16 schizophrenia based on Plaintiff's statement of his impairment. TR 219. Rather than  
17 relying solely on this conclusory finding, the ALJ properly considered Dr. Vaughan's  
18 entire assessment. As the ALJ notes in his decision, Dr. Vaughan indicated that Plaintiff  
19 admitted to poor compliance with medication, stating "[n]othing ever helps much. Beer  
20 helps the best, but I don't want to go there." TR 22, 223. The ALJ concluded that  
21 Plaintiff's "noncompliance does not support the alleged intensity and duration of his  
22 subjective complaints and limitations." TR 26. The Court finds this to be a specific,  
23 legitimate reason for giving less weight to Dr. Vaughan's opinion and that this reason is  
24 supported by substantial evidence of Plaintiff's alcohol abuse in the record. *See* TR 22-  
25 23.

26 The ALJ is responsible for determining credibility, resolving conflicts in medical  
27 testimony, and resolving ambiguities. *Andrews*, 53 F.3d at 1039. Some of the medical  
28 reports opine that Plaintiff could not perform substantially gainful employment. TR 219,

1 304. Others indicate that Plaintiff would be able to carry out simple instructions, adhere  
2 to a schedule, and adapt adequately. TR 283. Each of the medical reports cites  
3 Plaintiff's substance abuse. TR 223, 227, 278, 302, 305-318. To the extent that the  
4 reports were ambiguous, e.g., Dr. Nagella's report ("Todd is unable to seek gainful  
5 employment and would not succeed in any employment setting due to his mental illness  
6 *as well as* his history of substance abuse.") (TR 302) (emphasis added), the ALJ acted  
7 well within his power to weigh the evidence before him and make the determination that  
8 Plaintiff's substance abuse was a contributing factor material to his disability. The Court  
9 does not find error in the ALJ's analysis of the treating physician opinions. The Court  
10 finds that the ALJ provided specific, legitimate reasons, supported by substantial  
11 evidence in the record, for his assessment of the medical providers' opinions.

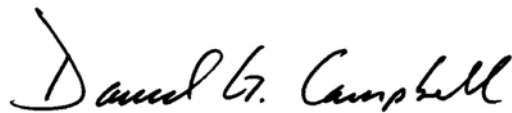
12 **C. Procedure for Evaluating Mental Impairments.**

13 Plaintiff alleges that the ALJ failed to use appropriate procedures for evaluating  
14 his borderline personality as a severe impairment. The ALJ applied the requisite five-  
15 step process. TR 21-29. He included borderline traits in his analysis of the severity of  
16 Plaintiff's impairments. TR 22; *see* 20 C.F.R. § 416.920(a)(3) ("We will consider all  
17 evidence in your case record when we make a determination or decision whether you are  
18 disabled."); 20 C.F.R. § 416.920(a)(4)(ii) ("At the second step, we consider the medical  
19 severity of your impairment(s).") The Court finds that the ALJ sufficiently considered  
20 Plaintiff's borderline personality diagnosis in the five-step evaluation of his overall  
21 mental impairments.

22 **IT IS ORDERED:**

- 23 1. Defendant's administrative decision denying benefits is **affirmed**.  
24 2. The Clerk is directed to terminate this action.

25 Dated this 20th day of October, 2011.

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David G. Campbell  
United States District Judge